Office-Supreme Court, U.S.
FILED
FEB 23 1981
ALEXANDER L. STEVAS,
CLERK

80-1431

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IN THE MATTER OF R_____ M. J_____
Appellant

On Appeal from the Supreme Court of Missouri

JURISDICTIONAL STATEMENT

CHARLES B. BLACKMAR
7305 Maryland
St. Louis, Missouri 63130
Phone (314) 725-8143
Attorney, American Civil Liberties Union of Eastern Missouri

CHARLES A. BLACKMAR
Suite 1200, 1100 Main Street
Kansas City, Missouri 64105
Phone (816) 221-6758
Attorneys for Appellant

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

1. Whether, consistent with the First and Fourteenth Amendments, a state may adopt and enforce a court rule listing the exclusive categories of information which are permissible in lawyers' advertisements in the printed media.

2. Whether, consistent with the First and Fourteenth Amendments, a state may discipline a lawyer for including in advertisements the concededly accurate and non-misleading information, not expressly prohibited by rule, that he is licensed to practice in two states, that he is admitted to practice before the Supreme Court of the United States, and that he practices in areas of law such as "personal injury," "contracts," and "securities and bonds," which designations are not among those explicitly approved by the state authorities.

3. Whether a state, consistent with the Commerce Clause, may discipline a lawyer for publishing in a telephone directory which circulates in adjoining states, the truthful information that he is licensed to practice in both states.

4. Whether a state, consistent with the First and Fourteenth Amendments, may discipline a lawyer for mailing a simple announcement of the opening of his office to persons with whom he is not acquainted, on the basis of a court rule limiting the mailing of announcements to "lawyers, clients, former clients, personal friends and relatives."

PARTIES TO THE PROCEEDING

The appellant, R_____ M. J_____ is a lawyer who was disciplined by the court below. The court ordered that his full name not be used in the official reports of the case and not be released to the media. The Clerk has been advised as to his full name and address.

The appellees are members of the Advisory Committee of the Missouri Bar, established by Rule 5 of the Supreme Court of Missouri, who filed an information in that court seeking disbarment of the appellant. They are Harold W. Barrick, Chairman, Owen W. Anglum III, Spencer J. Brown, Lynn M. Ewing Jr., Frank P. Sebree, Fred H. Mayer, Robert C. Smith Jr., and Donald J. Stohr. Wilson Schwenk, one of the informants, died while the case was pending in the court below.

Because the case presents issues of constitutionality of rules of the Missouri Supreme Court, 28 USC Sec. 2403(b) may be applicable and copies of the Notice of Appeal and Jurisdictional Statement have been served on the Honorable John Ashcroft, Attorney General of Missouri, pursuant to this Court's rule 28.4(c.)

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Opinions Below	1
Jurisdiction	1
Constitutional Provisions and Court Rules	2
Statement of the Case	7
The Federal Questions are Substantial	14
Appendix:	
A. Opinion below	A-1
Dissenting Opinion of Bardgett, Ch. J.	A-5
Dissenting Opinion of Seiler, J.	A-7
B. Judgment of December 15, 1980	A-12
C. Order Denying Rehearing, January 5, 1981	A-13
D. Notice of Appeal to this Court, filed January 8, 1981	A-13
E. Original Information filed in the Supreme Court of Missouri	A-16
F. Return to Information	A-19
G. Stipulation	A-23
H. Transmittal Letter for Report of Committee on Ethics and professional Responsibility of the Supreme Court of Missouri	A-27

I. Motion for Rehearing in the Supreme Court of Missouri A-31

TABLE OF AUTHORITIES

Cases

Bates v. Arizona, 433 US 350 (1977) 2,8,14,15,17

Central Hudson Gas and Electric Corporation v. New York Public Service Commission, US, 100 S. Ct. 2343 (1980) 14,15,16,17

Durham v. Brock, 498 F. Supp. 213, (DC MD Tenn., 1980) 16

Koffler v. Joint Bar Association, 51 NY 2d 140, 412 NE 2d 927 (1980) 17

Kentucky State Bar Association v. Stuart, 568 SW 2d. 933, (KY Sup Ct., 1978) 17

Ohralik v. Ohio, 436 US 477 (1978) 2

In re Primus, 436 US 412 (1978) 2,15,17

Constitution

U.S. Constitution Article I, Sec. 8 2,12

U.S. Constitution, Amendment I 2,12

U.S. Constitution, Amendment XIV 7,12

Court Rules

Missouri Supreme Court, Rule 4, DR 2-101.....2,8,14,15

Missouri Supreme Court, Rule 4, DR 2-102 6,8,16

Advisory Committee Addendum to Missouri Supreme Court DR 2-101-B 4,14,16

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IN THE MATTER OF R_____ M. J_____
Appellant,

On Appeal from the Supreme Court of Missouri

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of Missouri, together with the dissenting opinions of Bardgett, Ch. J. and Seiler, J., is reported 609 S.W.2d 411. The case was filed originally in the Supreme Court of Missouri, and there are no other opinions.

JURISDICTION

The opinion of the Supreme Court of Missouri was filed and judgment privately reprimanding the appellant and directing him to pay costs was entered on December 15, 1980. Motion for rehearing (App. 31) was denied on January 5, 1981.

Notice of Appeal to this Court was filed in the Supreme Court of Missouri on January 9, 1981.

This case involves the constitutionality of Rules DR 2-101-(B) and DR 2-102 of Rule 4 of the Supreme Court of Missouri, and the decision of the court below is in favor of the constitutionality. Such rules are considered statutes under 28 USC Sec. 1257(2). See Bates v. Arizona, 433 US 350 (1977); In re Primus, 436 US 412 (1978); Ohralik v. Ohio, 436 US 477 (1978.) This Court, therefore, has jurisdiction under 28 USC Sec. 1257 (2).

CONSTITUTIONAL PROVISIONS AND COURT RULES

Constitution, Article I, Section 8

The Congress shall have power:...To regulate commerce ... among the several states.

First Amendment

Congress shall make no law...abridging the freedom of speech or of the press ... .

DR 2-101-(B), Rule 4, Supreme Court of Missouri

A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication respecting the quality of legal services or containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish, subject to DR 2-103, the following information in newspapers, periodicals and the yellow pages of telephone directories distributed in the geographic area or areas in which the lawyer resides or maintains offices or in which a substantial part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication complies with DR 2-101(A), and is presented in a dignified manner:

1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;

2) One or more particular areas or fields of law in which the lawyer or law firm practices if authorized by and using designations and definitions authorized for that purpose by The Advisory Committee;

3) Date and place of birth;

4) Schools attended, with dates of graduation and degrees;

5) Foreign language ability;

6) Office hours;

7) Fee for an initial 30-minute consultation;

8) Availability upon request of a schedule of fees;

9) Credit arrangements for payment of fees will be given consideration;

10) The fixed fee to be charged for the following specific routine legal services:

    1. An uncontested dissolution of marriage;

    2. An uncontested adoption;

    3. An uncontested personal bankruptcy;

    4. An uncomplicated change of name;

    5. A simple warranty or quitclaim deed;

    6. A simple deed of trust;

    7. A simple promissory note;

    8. An individual Missouri or federal income tax return;

9. A simple power of attorney;

10. A simple will;

11. Such other services as may be approved by The Advisory Committee; the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged in print size at least equivalent to the largest print used in setting forth the fee information.

Missouri Bar Advisory Committee Rule

ADDENDUM TO DR2-101(B)(2)

Pursuant to the direction and authority of DR2-101(B)(2) of the Order of the Supreme Court of Missouri entered October 24, 1977, effective January 1, 1978, the Advisory Committee adopts and promulgates the following rules and regulations for advertising by the legal profession in Missouri to be effective simultaneously with the Order of the Supreme Court on January 1, 1978.

* * *

III. Subject to DR2-101(A) and (B), the following areas for fields of law may be advertised by use of the specific language hereinafter set out:

1. "General Civil Practice"

2. "General Criminal Practice"

3. "General Civil and Criminal Practice."

If a lawyer or law firm uses one of the above, no other area can be used except specialties under Paragraph I. If one of the above is *not* used, then a lawyer or law firm can use one or more of the following:

1. "Administrative Law"
2. "Anti-Trust Law"
3. "Appellate Practice"
4. "Bankruptcy"
5. "Commercial Law"
6. "Corporation Law and Business Organizations"
7. "Criminal Law"
8. "Eminent Domain Law"
9. "Environmental Law"
10. "Family Law"
11. "Financial Institution Law"
12. "Insurance Law"
13. "International Law"
14. "Labor Law"
15. "Local Government Law"
16. "Military Law"
17. "Probate and Trust Law"
18. "Property Law"
19. "Public Utility Law"
20. "Taxation Law"

21. "Tort Law"

22. "Trial Practice"

23. "Workers Compensation Law."

No deviation from the above phraseology will be permitted and no statement of limitation of practice can be stated.

If one or more of these specific areas of practice are used in any advertisement, the following statement must be included in the same advertisement in print size at least equivalent to the largest print used in setting forth the areas of practice:

"Listing of the above areas of practice does not indicate any certification of expertise therein."

ADOPTED BY THE ADVISORY COMMITTEE. MISSOURI BAR ADMINISTRATION ON NOVEMBER 13, 1977.

DR 2-102 Of Rule 4 Of The Supreme Court Of Missouri

DR 2-102. Professional Notices, Letterheads and Offices, and Law Lists

(A) A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, or similar professional notices or devices, except that the following may be used if they are in dignified form:

* * *

(2) A brief professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm, which may be mailed to lawyers, clients, former clients, personal friends, and relatives. It shall not state biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in his association, but

it may state the immediate past position of the lawyer. It may give the names and dates of predecessor firms in a continuing line of succession. It shall not state the nature of the practice except as permitted under DR 2-105.

STATEMENT OF THE CASE

Appellant has been disciplined for violating two rules regarding legal advertising promulgated by Missouri authorities. The first, DR2-101-(B)(2), was construed by the court below as forbidding the mention in advertising of any information not covered by the ten listed categories. Appellant was disciplined for violation of this rule (Counts I, II and IV) because he included in three printed advertisements the accurate information that he is permitted to practice in certain courts, and that he practices in certain areas of law which are described in words other than those explicitly approved by the state authorities.[1] The second rule, DR 2-102-(A)(2), forbids the mailing of announcement cards to persons "other than lawyers, clients, former clients,

---

[1]Counts I and II also complained of the absence of a disclaimer of certification, as required by the Advisory Committee Addendum. As the dissenting opinion of Judge Seiler (app. 7) shows, the advertisements which were the subject of these counts were contracted for before either the amended rule or the Advisory Committee Addendum were published, and before the appellant had notice of the new requirements. The stipulation (app. 23) shows that the appellant tried, unsuccessfully, to withdraw these advertisements after learning of the disclaimer requirement. We submit that, under these circumstances, discipline for failing to include the disclaimer would violate the due process clause of the Fourteenth Amendment, but do not otherwise challenge the disclaimer requirements, which are suggested by the Bates opinion (100 S.Ct l.c. 1 2709). The disclaimer was included in the advertisement which is the subject of Count IV, and in all subsequent advertising. It is manifest that the court below upheld its existing rules in their entirety, and found violation as charged of Count IV as well as of the Counts I and II. It is also clear that the court would hold the advertisement illustrated above, p. 9 to be a violation of its rules.

personal friends and relatives." Appellant was disciplined for violating this rule (Count III) because announcement cards were mailed to two persons who were not personally acquainted with the appellant.

The history of the adoption of the rules in question bears on the issues presented here; consequently we discuss it briefly.

Following the decision of this Court in Bates v. Arizona, 43 US 350 (1977), the Supreme Court of Misosuri amended DR 2-101 of its Rule 4. The amended rule (p. 2, above) was adopted on October 24, 1978, effective January 1, 1978.[2] DR 2-101-(B) listed ten specific categories of information which were approved for lawyers' advertisements in the printed media. The court delegated to the Advisory Committee, established by its Rule 5, the authority to specify "designations and definitions" of "particular areas of the law in which the lawyer practices."

On November 18, 1977 the Advisory Committee published an Addendum to DR 2-101(B)(2), page 4 above. This addendum listed 23 "fields" or "areas" of law. There was no accompanying report or other explanation as to why certain areas and phrasings were chosen and others omitted. The Addendum contained a statement as follows:

> "No deviation from the above phraseology will be permitted and no statement of limitation of practice can be stated."

The Missouri Supreme Court made no change in its DR 2-102(A)(2), page 6 above, which dealt with the mailing of announcements and permitted such mailing only to "lawyers, clients, former clients, personal friends and relatives. ..."

---

[2]The Missouri Supreme Court substantially approved the recommendations of its Standing Committee on Professional Ethics and Responsibility, referred to in the opinion below (App. 1). That Committee's report, in the form of a transmittal letter, is included as Appendix 23.

The appellant was admitted to the bar in Missouri and in Illinois in 1973. After some years with the Securities and Exchange Commission, he opened an office as a sole practitioner in Clayton, a metropolitan suburb of St. Louis, Missouri and county seat of St. Louis County. In connection with the opening of this office, and after Bates was decided, he mailed some "tombstone" announcements. It was stipulated (App. 25) that some of these were mailed by his wife, using a roster of a charitable organization to which she belonged for addresses, and that she mailed two announcements to a couple who were not personally acquainted with the appellant. The announcement which is the subject of Count III of the information, read as follows:

R_____ M. J_____
Formerly with the United States
Securities and Exchange Commission

IS PLEASED TO ANNOUNCE THE OPENING OF HIS OFFICE FOR THE GENERAL PRACTICE OF LAW

Suite 1404
Chromalloy Plaza

SAINT LOUIS (CLAYTON) MISSOURI 63105

(314) 862-4321

Twice in 1978 the appellant placed advertisements in the Yellow Pages, and once he placed a newspaper advertisement. These form the basis for Counts I, II and IV. The advertisement declared on in Count IV is fairly typical of the three advertisements, and demonstrates the kind of advertising the appellant proposes to use in the future. It was published in the St. Louis telephone directory, which circulates in Missouri and Illinois, and read as follows:

J_____, R_____ M.

.Corporate
.Partnership
.Real Estate
.Tax
.Bankruptcy
.Probate
.Contract
.Anti-Trust
Labor
.Criminal
.Aviation
.Securities - Bonds
.Personal Injury
.Trials & Appeals
.Wills, Estate Planning
.Pension & Profit Sharing Plans
Workmen's Compensation
.Divorce, Separation
.Custody, Adoption
.Zoning & Land Use
.Entertainment/Sports
.Food, Drug and Cosmetic
.Communication

(Listing of the Above Areas Does Not Indicate Certification Therein)

Admitted to Practice Before
THE UNITED STATES
SUPREME COURT

Licensed in: MISSOURI & ILLINOIS

120 South Central 721-2000

* * *

It was stipulated that the areas of law listed in this advertisement are among the areas listed by the American Bar Association in its compilation of "fields of law," and that the advertisement was in compliance with Illinois rules. (App. 25-26)

On November 19, 1979 the Advisory Committee, which is the authorized prosecution authority for disciplinary actions against Missouri lawyers, filed an original information in four

counts in the Supreme Court of Missouri.[1] Counts I, II and IV of the information charged that the printed advertisements as described above violated the new DR 2-101-(B) of Rule 4 of the Supreme Court of Missouri in that each advertisement "lists the courts in which (appellant) is admitted to practice, lists areas of law not admitted for advertising purposes." Count III charged that appellant caused announcements to be

> "sent to persons other than lawyers, clients, former clients personal friends and relatives, contrary to DR 2-102-(A)(2), Rule 4, of the Supreme Court of Missouri. ..."

No claim was made that the text of the announcements so mailed contained impermissible matter.

No claim was made in any count that the advertising matter contained any statement or claim

> "...respecting the quality of legal services or containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim. ...",

so as to violate DR 2-101-(A).

The information concluded with the prayer that the lawyer

> "...be disbarred, that his right and license to practice law in this state be cancelled and terminated, and that his name be stricken from the roll of attorneys in this state, or such other discipline as the Court deems appropriate in the premises".

---

[1]The Advisory Committee is an accusatory body and not a tribunal. By Rule 5, nevertheless, it is obliged to afford accused attorneys a closed hearing. The appellant appeared at such a hearing accompanied by present counsel and sought to persuade the Advisory Committee that it should not file an information, asserting the constitutional arguments here advanced. The Advisory Committee nevertheless found probable cause, and filed an information seeking disbarment. The finding of probable cause is not an adjudication, and no opinion was authorized or issued.

The constitutional issues here relied on were placed directly in issue in the return. (App. 19) Paragraph (f) of the return to Count I charged that the rules in question violated the freedom of speech provisions of the First and Fourteenth Amendments. This paragraph was incorporated by reference in the return to Counts II and IV. The return to Count III charged that a rule limiting the mailing of announcements to persons in certain categories violated the same constitutional provisions. Paragraph (c) of the Return to Count IV claimed that, under the Commerce Clause of Article I, Section 8, the appellant had the right to advertise his admission to practice in Illinois in a bi-state telephone directory.

The case was presented to the Supreme Court of Missouri by means of a stipulation (App. 23) No testimony other than testimony set out in the stipulation was presented.

In an opinion handed down December 15, 1980, (App. 1) the Supreme Court of Missouri sustained the charges contained in the information and upheld the constitutional validity of all challenged rules, saying:

> "...On October 24, 1977 there was every reason to believe that the good-faith efforts made by the Committee and this court to follow *Bates and O'Steen supra,* would pass constitutional muster. ...
>
> "We are urged now by (appellant) to follow the *Central Hudson* model. We respectfully decline to enter the thicket of attempting to anticipate and to satisfy the *subjective ad hoc* judgments of a majority of the justices of the United States Supreme Court. ..."

In reaching the conclusion it did the court below necessarily rejected the appellant's constitutional challenges to the rules in question and found that the allegations of all four counts were established. The opinion of the majority is cryptic, but the two dissenting opinions clearly show that the constitutional issues

were considered by the court and rejected by the majority. The dissenting opinions discuss the Central Hudson case, which the majority refused to analyze.

A motion for rehearing seeking delineation of the court's precise holdings (App. 31) was summarily denied. The judgment was stayed pending proceedings in this Court.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

1. The First Amendment Does Not Permit A Scheme Of Regulation Of Legal Advertising Which Specifies The Sole And Exclusive Items Which May Be Included In Advertisements And Forbids The Publication Of Any Other Items, Even Though Purely Factual And Not "False, Deceptive Or Misleading."

Missouri's DR 2-101-(B) is drafted on the theory that a state may adopt a rule specifying the only items which may be used in lawyers' advertisements, and that lawyers may be disciplined for including any other information. This appellant was disciplined for stating that he was "Licensed in Missouri and Illinois" and "Admitted to Practice before the United States Supreme Court," even though no provision of the governing rules prohibited the making of such statements. He was also reprimanded for listing "personal injury" among the fields of law practiced, when the approved phrasing called for the legalistic designation "tort law," (Later changed by the Advisory Committee to "negligence law.") He was disciplined for saying that he handled "contract" matters, and, in spite of his S.E.C. experience, "securities and bonds," because those fields of law were not listed in the Advisory Committee Addendum authorized by the rule.

Missouri's rules, construed as the court below construed them, do not afford lawyers the First Amendment protection guaranteed by Bates, the holding of which was not confined to the propriety of advertising the charges for routine legal services. This Court expressly held that Messrs, Bates and O'Steen could use the term "legal clinic" and could state that they charged "very reasonable fees." The appellant's expressions challenged in this case are essentially similar. They concededly are not "false, deceptive or misleading," and therefore constitute protected speech. The Missouri rules in question, indeed, would forbid the publication of the Bates advertisement,

because it contains matters not explicitly authorized by the local rules.

The invalidity of a plan such as Missouri's is conclusively demonstrated by Central Hudson Gas and Electric Corporation v. Public Service Commission, US, 100 S. Ct. 2343 (1980), which approved the statement of In re Primus, 436 U.S. 412, (1978), that restrictions on commercial speech must be "narrowly drawn." Under the reasoning of Primus and Central Hudson a limitation of advertising to specific items, with a general prohibition of all others, would be manifestly invalid. The court below did not attempt to harmonize its rules with Central Hudson but, to our astonishment, expressly refused to analyze that opinion or to follow it.

Missouri's DR 2-101-(B), applied to the appellant, is flatly invalid under the four-part test of Central Hudson. The information in the advertisements concerns lawful activity and is not misleading. It is therefore "protected speech." Granting that there is a substantial government interest in protecting the public against false or misleading advertising by lawyers, and that a scheme such as Missouri's might be convenient from the standpoint of the regulatory authorities, the Missouri rule utterly and flagrantly fails the fourth part of the Central Hudson test because it is far "more extensive than is necessary to serve (the substantial governmental) interest." This barn-burning rule goes far beyond the necessities of effective and proper regulation in forbidding the appellant to state that he is licensed in both states, or that he practices in such areas as "securities," in which he has special experience, and in prohibiting him from including the other challenged information, with no intimation that this information is false or misleading, for the sole reason that the information is not expressly authorized by the rule.[4] Central Hudson was decided in order to preclude regulation of commercial speech in the manner here attempted.

---

[4]The Advisory Committee Addendum does not limit the number of approved "fields" or "areas" of law which a lawyer may include in an advertisement. Nor does it require any experience at all in the areas the lawyer chooses to list.

Hudson was decided in order to preclude regulation of commercial speech in the manner here attempted.

There is no sound basis for any argument that Central Hudson does not apply to lawyers' advertisements. The prominent citation of Bates and Primus shows that this Court was trying to formulate guidelines for all commercial speech, including legal advertising.

The issue before the Court is of great importance. If the judgment below stands the lawyer will be unable to publish advertisements of the kind he has used in the past, even though he has the constitutional right to do so. Missouri will be able to restrict the dissemination of truthful and helpful information about lawyers, by perpetuing regulation which seeks to prohibit any advertising at all of items which are not expressly approved. Some other states have rules similar to Missouri's[5] and others will be encouraged to adopt rules of this kind, unless this Court acts.

2. There Is No Constitutional Basis For Distinguishing Between Mail Advertising And Advertising In The Printed Media.

The appellant has been disciplined for mailing tombstone announcements to persons not acquainted with him. The court below makes no attempt at justifying a regulation of this kind. DR 2-102-(A)(2) is flatly in conflict with the Central Hudson principle, in prohibiting all mailed advertising to members of the public who are not within the categories listed in the rule. The regulation goes far beyond any legitimate governmental purpose.

The court below offered no reason as to why an advertisement which could be printed in the newspaper could not be mailed to members of the public, by one who is willing to pay the postage. Two state courts of last resort have held that a lawyer has the same constitutional right to mail an advertise-

---

[5]See Durham v. Brock, 498 F. Supp. 213 (DC MD Tenn, 1980.)

ment that he has to publish it in a printed medium. Kentucky State Bar Association v. Stuart, 568 SW 2d. 933, (Ky. S. Ct., 1978); Koffler v. Joint Bar Association, 51 NY 2d 140, 412 NE 2d 927 (1980), reversing 420 NYS 2d. 560, (App. Div. 1979.)

The appelless conceded in their brief in the court below that the announcements in this case were not mailed to persons who were known to have pending legal business, and that there was no "solicitation."

The Missouri rules cannot be justified as a regulation of the "media" in which lawyers' advertisements might appear. This Court in Bates referred to regulation of media of advertising, but it is clear from context that the Court had the special problems of the electronic media in mind. (97 S.Ct. l.c. 2709) No special reason has been offered as to why restrictions on mailed advertisements are appropriate or necessary. The blanket prohibition of mailings except to certain addressees must necessarily fail under the holdings of Primus and Central Hudson,

3. The Missouri Supreme Court Has Failed To Perform Its Plain Constitutional Duty Under Article VI Of The Constitution Of The United States.

The substantiality of the federal questions is highlighted by the egregious behavior of the court below in saying that it would "respectfully decline" to apply the Central Hudson test to its rules on advertising. The court below absolutely refused to do the screening which is its plain duty. This Court must insist on adherence to its controlling decisions. Bates, Primus and Central Hudson represent a continuum designed to provide guidelines for the regulation of commercial speech. Unless this Court acts the decisions designed to provide First Amendment protection for commercial speech will be set at nought, and the states will be able to erode constitutional protections by adopting rules on the Missouri model.

4. The Case Is Appropriate For Summary Reversal.

This Court's Rule 15(h) directs us to "include reasons why the questions presented are so substantial as to require plenary consideration, with briefs and oral argument, for their resolution." For the reasons set out above, the decision should not be allowed to stand without plenary consideration by this Court. Quite the contrary; this is a case in which summary reversal would be appropriate. The decision of the court below is flatly in conflict with Bates and Central Hudson, in disciplining the appellant for plain, truthful advertising which is not claimed or shown to be false or misleading. No new constitutional problems are involved.

CONCLUSION

The Court should accept jurisdiction and either hear the case on the merits or summarily reverse.

Respectfully submitted,

CHARLES B. BLACKMAR
7305 Maryland
Saint Louis, Missouri 63130
(314) 725-8143

CHARLES A. BLACKMAR
Suite 1200, 1100 Main Street
Kansas City, Missouri 64105
(816) 221-6756

Attorneys for Appellant

APPENDIX

APPENDIX A

Opinion Below

Supreme Court of Missouri
en banc
December 15, 1981
No. 61894

In The Matter of: R ____ M. J ____,
Respondent.

This is a disbarment proceeding wherein respondent questions the constitutionality of DR 2-101 of Rule 4 of this Court.

On June 25, 1974, this Court entered an Order appointing a Select Committee on Professional Ethics and Responsibility and charged it with the duty of reviewing Rule 4 of this Court and making such recommendations for revisions as deemed appropriate. The members of the Committee were: Robert L. Hawkins, Jr., Cole County, Chairman; James Ruddy, St. Louis County; David E. Blanton, Scott County; Meredith B. Turner, Greene County; Forrest M. Hemker, St. Louis City; R. Leroy Miller, Grundy County; Bertram W. Tremayne, Jr., St. Louis County; Martin J. Purcell, Jackson County; Donald L. Mason, Jackson County; and J. Andy Zenge, Jr., Lewis County.

On June 27, 1977, in Bates and O'Steen v. State Bar of Arizona, 433 U.S. 350 (1977), the Supreme Court of the United States posited a confrontation between the traditional concern for attorney professionalism and the public need to know of the availability, nature and price of legal services and came down on the consumer side under the aegis of protecting attorneys' rights to free flow of commercial speech.

On September 9, 1977, the Hawkins Committee submitted a report to this Court which sought to implement the teachings of *Bates and O'Steen, supra.* On October 24, 1977, this Court pro-

mulgated DR 2-101, a copy of which is appended to this opinion. The effective date of DR 2-101 was January 1, 1978. It can truthfully be stated that a constitutional study in depth was made before DR 2-101 was adopted. On Octoaber 24, 1977, there was every reason to believe that the good-faith efforts made by the Committee and this Court to follow *Bates and O'Steen, supra,* would pass constitutional muster.

However, on June 20, 1980, in Central Hudson Gas & Electric Corporation v. Public Service Commission of New York, ____ U.S. ____ (1980), a case in which commercial speech was at issue, the Supreme Court of the United States constructed a model:

> "Writing for the majority, Justice Lewis F. Powell Jr. delineated a four-part analysis to determine the constitutionality of government clamps on commercial speech. To come within the ambit of the First Amendment, Justice Powell explained, commercial speech must concern lawful activity and not be misleading. Once this demonstration is made, commercial speech may be restrained only if the government proves both that the restraints directly advance a substantial government interest and are not more extensive than necessary to serve that interest."

Fein, *Free Speech in Ads Wins Key Plug From Brethren,* The National Law Journal, Nov. 17, 1980, at 15, col. 1.

We are urged now by respondent to follow the *Central Hudson* model. We respectfully decline to enter the thicket of attempting to anticipate and to satisfy the *subjective ad hoc* judgments of a majority of the justices of the United States Supreme Court. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (the compelling state interest test); and Godfrey v. Georgia ____ U.S. ____ (1980) (the imposition of the death penalty).

We recognize respondent's right to press on in the courts authorized by Article III of the United States Constitution. If he

exercises that right and obtains a favorable result there, we can *then* decide whether we will honor our duty to exercise "superintending control over all courts" in Missouri (Mo. Const. art. V, § 4) or will order DR 2-101 excised from Rule 4 of this Court.

We are aware, of course, that this is a "test" case and that respondent's violation of Missouri's Code of Professional Responsibility is minimal.

Respondent is ordered to pay the costs herein and is privately reprimanded. In re Sullivan, 494 S.W.2d 329, 334 (Mo. banc 1973).

Robert T. Donnelly, Judge

Rendlen, Welliver, Morgan and Higgins, JJ, concur; Bardgett, C.J., dissents in separate dissenting opinion filed; Seiler, J., dissents in separate dissenting opinion filed.

Appendix to Opinion

DR 2-101 - Publicity

(For DR 2-101(A) & (B), See p. 2, above)

* * *

(C) If a lawyer advertises a fee for a service, the lawyer must render that service for no more than the fee advertised.

(D) Unless otherwise specified in the advertisement if a lawyer publishes any fee information authorized under DR 2-101(B) in a publication that is published more frequently than one time per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after

such publication. If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication that is published once a month or less frequently, he shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication which has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication but in no event less than one year.

(E) This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

(1) In political advertisements when his professional status is germane to the political campaign or to a political issue.

(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.

(3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.

(4) In and on legal documents prepared by him.

(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.

(F) A lawyer shall not compensate or give anything of value to representatives of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item.

DISSENTING OPINION

I respectfully dissent and would dismiss the information. The work in 1977 of the committee referred to in the principal opinion was and is much appreciated. The question of what may be done in the regulation of lawyer advertising without offending the First Amendment of the United States Constitution or its counterpart in the Missouri Constitution is still unclear. Of course, unrestrained lawyer advertising can be a trap to snare the unwary. Yet, the public has an interest in knowing whether a lawyer practices in a particular field, what courts he practices in, and the cost of services. And the lawyer has a first-amendment right to so inform the public. It seems to me that is essentially what Bates and O'Steen v. Arizona, 433 U.S. 350 (1977), holds, and it was the holding in that case that we sought to satisfy in our modification of DR 2-101 of Rule 4, including the authorization to the committee to draw up the addendum referred to in Judge Seiler's dissent. That addendum was a sort of "menu" which required the use of certain words, *e.g.*, "tort law", to describe certain fields of practice. The committee and the Court were trying to be helpful by assuring the lawyer that if he used those descriptions his advertisement would be permissible. But, if advertising a practice in a given field of law *is* permissible then can we say that the state has a significant interest in requiring the use of the words "tort law" but not the words "personal injury"? In my opinion, we cannot support such a conclusion with reason. It was, perhaps, a mistake to seemingly require strict adherence to the boiler plate language of the addendum, but it can be used as a guide. I cannot, therefore, join in an opinion which would continue to maintain the addendum as the sole and only words permitted to describe a field of practice in an advertisement. The same is true of the term "contracts" used in respondent's advertisement. The word "contract" is in common usage and means something to nonlawyers. I can find no synonyms for it in the addendum; yet, in general parlance, "contract" or "contract law" describes an area of practice in an understandable way to nonlawyers.

In approving DR 2-101 and the addendum, we were, in a sense, construing the First Amendment as articulated in Bates and O'Steen, *supra*, The adoption of a rule does not involve the adjudication of a case or controversy, and consequently we did not have the full benefit of adversarial briefs and argument as we do in cases here for adjudication and as we now have in this case. We should recognize that in those circumstances we can more readily err and be too restrictive. In my opinion, that is what happened here and this is our opportunity to correct the error. I would hold that respondent was not guilty of unethical conduct in using the terminology of "Personal Injury", "Workmen's Compensation", and "Contracts". I would further hold the addendum shall be considered as a guide and that no unethical conduct is committed if the terminology used to describe a field of practice is reasonable and fairly describes to a nonlawyer the field of law spoken of in the advertisement.

I find no unethical conduct involved in respondent stating he is admitted to practice in Missouri and Illinois and the United States Supreme Court as it seems to me the reader benefits from knowing the courts in which he is admitted to practice and there is no identifiable state interest served in prohibiting an attorney from so informing the public. I disagree with Judge Seiler's subjective view of the ad regarding respondent's right to practice in the United States Supreme Court. I would hold a lawyer may state the states or courts to which he has been admitted to practice. Nor do I think the mailing of essentially the same material constitute unethical conduct.

I do not, however, regard Central Hudson Gas & Electric Corporation v. Public Service Commission of New York, ____ U.S. ____, 100 S.Ct. 2343 (1980), as applicable, in its entirety, to advertising by lawyers. I believe we should continue to exercise responsibility to the public in regulating the practice of law and this includes advertising. But I also believe we must do so reasonably and be willing to recognize errors we may make in

rules and correct them whenever the opportunity to do so presents itself.

For these reasons I would dismiss the information.

JOHN E. BARDGETT, Chief Justice.

DISSENTING OPINION

I respectfully dissent. I would dismiss the information. In explaining why, it is first necessary to set out certain facts. The Advisory Committee's information of November 19, 1979 contains four counts. Count I alleges that respondent placed an advertisement in the January/February 1978 issue of a neighborhood newspaper which advertisement did not comply with DR 2-101(B), in that it listed the courts [sic] in which respondent was admitted to practice, listed areas of law the advertising of which had not been approved, and did not contain a statement disclaiming certification of expertise in said areas. Count II contains the same allegations except that the advertisement was placed in the February 1978 St. Louis Suburban West telephone directory Yellow Pages. Count III alleges that respondent allowed professional announcement cards, announcing the opening of respondent's office, to be sent to persons other than lawyers, clients, former clients, personal friends and relatives, contrary to DR 2-102(A)(2). Count IV contains the same allegations as Counts I and II except that the advertisement was placed in the August 1978 St. Louis Yellow Pages and did contain a disclaimer.

The specific items in respondent's ads which are at issue are that he listed that he was admitted to practice before the United States Supreme Court and that he listed fields of law by using titles differing from the specific titles approved by the Advisory Committee, as, for example, "Personal Injury" instead of the

approved title "Tort Law", "Workmen's Compensation" instead of the approved title "Workers Compensation Law" and "Contracts" where no such area of law is approved for advertising.

A list of the approved areas of law and terminology therefor is not found in DR 2-101. It appears in the Advisory Committee's addendum to DR 2-101(B)(2), published only in the January-February 1978 Journal of the Missouri Bar at page 51. The addendum lists twenty-three areas of law which can be used in advertisements and adds that "No deviation from the above phraseology will be permitted . . . ." It specifies that the following disclaimer be included in the advertisement: "Listing of the above areas of practice does not indicate any certification of expertise therein."

First, with regard to respondent's failure to include such a disclaimer as alleged in Counts I and II, the addendum which required it was adopted by the Advisory Committee on November 18, 1977. Respondent was sent a copy by the Advisory Committee on December 19, 1977. This was the first time that respondent could have been aware of the addendum, because it was not published until the January-February 1978 issue of the Journal of the Missouri Bar.[1] When respondent received the copy of the addendum, he telephoned the publishers with whom he had placed the advertisements for the purpose of modifying them to comply with the addendum, but in each case was told that no change could be made in that the publication process had gone too far. Respondent's later advertisement contained the disclaimer and I would therefore dismiss those parts of Counts I and II that relate to the disclaimer.

---

[1] In our order of October 24, 1977, which amended the disciplinary rules as to advertising, effective January 1, 1978, we authorized the Advisory Committee to establish designations and definitions of particular areas or fields of law as to which a lawyer could advertise. Those attorneys who did not look at or receive the January-February

Second, with regard to respondent's listing that he is admitted to practice before the United States Supreme Court, I have my doubts as to its propriety and I am skeptical as to the reasons for its inclusion. Respondent made no mention of any other court in his advertisements. The United States Supreme Court is the highest and best known court in the land. It also is the court least likely to be involved in the law business of the average client. Although the fact of being admitted to the Supreme Court might impress a person looking for a lawyer, the question arises: does such information really help the consumer in obtaining needed legal services or is it more a device to seize his attention and to convey the idea that one who is admitted to the United States Supreme Court is per se a better lawyer? Suppose a lawyer made such information the centerpiece of his advertisement, displaying it even more prominently than respondent has in the advertisements before us? I doubt that informational value gained by the consumer by advertising the isolated fact of admission to the United States Supreme Court justifies the risk of the false impression that such advertising may convey. I do not think that such a listing should be permitted, but I do not believe respondent's actions warrant discipline in this particular case in which the lawyer is trying to obtain a ruling on what he can and cannot do.

Third, with regard to the other charges, I do not believe we can constitutionally prohibit lawyers from listing areas of law using the term "Personal Injury" instead of the approved ter-

---

1978 issue of the Journal of the Missouri Bar may not be aware of the existence of the addendum since it does not appear anywhere else, either in the Supreme Court Rules or in any statutory compilation. We have looked at the 1980 Yellow Pages in the telephone directories for both Kansas City and St. Louis and observe that numerous advertisements seem to be in violation of the addendum. This indicates to me that many lawyers are not aware of the addendum, as I do not believe that so many lawyers would knowingly want to publish advertisements which are out of compliance therewith.

minology "Tort Law" or the like as to other titles or from listing areas of law not covered in the addendum such as "Contracts." There is no need to be so restrictive. It is self-evident that "Personal Injury" is much more understandable to a layman than "Tort Law" and that listing "Contracts" might be helpful information to a prospective consumer. The same can be said as to other examples. Nor do I believe we can constitutionally prohibit lawyers from using first class mail to send out the same information that they could put in a newspaper advertisement. *See* In the Matter of Alfred S. Koffler, No. 433 (N.Y. Ct.App. Oct. 21, 1980).

Although Bates and O'Steen v. Arizona, 433 U.S. 350.383 (1977) does not specifically speak to the above situations, the United States Supreme Court did find that limiting commercial speech which 1) is false, deceptive, or misleading; 2) makes claims as to the quality of service; 3) involves in person solicitation; or 4) concerns illegal activities, was "clearly permissible." None of the above factors is present with regard to listing areas of law or sending announcement cards to strangers through the first class mail.

More recently, in Central Hudson Gas & Electric Corporation v. Public Service Commission of New York, ____ U.S. ____ 100 S.Ct. 2343, 2351 (1980), the Court stated:

> "In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."

The above cases cast serious doubt on the constitutionality of the restrictions sought to be enforced against respondent, and, in my judgment, there is even more doubt under the free speech clause of the Missouri Constitution, art. I, § 8, which, as I have submitted on other occasions, is broader and gives greater freedom of speech to the individual than its federal counterpart.

As stated earlier, I would dismiss the information.

Robert E. Seiler, Judge

APPENDIX B

Judgment Below

SUPREME COURT OF MISSOURI
en banc
December 15, 1980

OPINION BY DONNELLY, J.

61894 In the Matter of: R_____ M. J_____, Respondent.

RESPONDENT ORDERED TO PAY COSTS HEREIN AND IS PRIVATELY REPRIMANDED. Rendlen, Welliver, Morgan, and Higgins, JJ., concur; Bardgett, C.J., dissents in separate dissenting opinion filed; Seiler, J., dissents in separate dissenting opinion filed.

APPENDIX C

Ruling On Motion for Rehearing

SUPREME COURT OF MISSOURI
January 5, 1981
No. 61894

"Respondent's motion for rehearing overruled."

"Respondent's motion to stay sustained."

APPENDIX D

Notice Of Appeal

IN THE SUPREME COURT OF MISSOURI

No. 61894

In the Matter of R_____ M. J_____

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES
(Filed January 9, 1981)

Notice is hereby given that R_____ M. J_____, the appellant above named, hereby appeals to the Supreme Court of the United States from the final jdugment of the Supreme Court of Missouri entered herein December 15, 1980, reprimanding the appellant and ordering to pay the costs of a disciplinary proceeding.

This appeal is taken pursuant to 18 USC Sec. 1257(2).

/s/ CHARLES B. BLACKMAR
7305 Maryland
St. Louis, Missouri 63130
(314) 725-8143

/s/ CHARLES A. BLACKMAR
Suite 1200, 1100 Main Street
Kansas City, Missouri 64112
(816) 221-6758

Attorneys for Appellant

I certify that I mailed a copy of the above Notice of Appeal to John W. Inglish, 309 North High Street, California, Missouri 65018, Attorney for all appellees, and to The Honorable John Ashcroft, Attorney General of Missouri, Supreme Court Building, Jefferson City, Missouri 65101, this 7th day of January, 1981.

CHARLES B. BLACKMAR
Attorney for Appellant

APPENDIX E

Information (Filed November 19, 1979)

(Caption omitted)

INFORMATION

Comes now Harold W. Barrick, General Chairman of the Advisory Committee, and informs the Court as follows:

1. That Harold W. Barrick, Owen W. Anglum, III, Spencer J. Brown, Lynn M. Ewing, Jr., Frank P. Sebree, Fred H. Mayer, Wilson Schwenk, Robert C. Smith, Jr., and Donald J. Stohr, are the duly appointed, qualified and acting members of the Advisory Committee, created by Rule 5 of the Supreme Court of Missouri.

2. That Richard M. Jacobs, hereinafter referred to as the Respondent, is now and was at all times herein mentioned a duly licensed attorney at law, admitted to practice law in and before all of the courts of this state, is a member of the Bar of the State of Missouri, and now maintains a law office and engages in the practice of law in Clayton, St. Louis County, Missouri.

3. That Respondent, while engaged in the practice of law in the State of Missouri in Clayton, St. Louis County, and in the vicinity thereof, did wrongfully, unethically and unprofessionally, and in violation of his duties as a lawyer, engage in and be guilty of the following acts of professional misconduct hereinafter set forth particularly, to wit:

Count I

That Respondent did cause an advertisement to be placed in the January/February 1978 issue of the West End Word, a newspaper printed and distributed in the western part of St. Louis County, Missouri, said advertisement being for Respon-

dent's law office., which did not comply with the provisions of the Order of the Supreme Court of Missouri dated October 24, 1977, concerning lawyer advertising and the Addendum thereto adopted by the Advisory Committee on November 18, 1977, in that said advertisements: lists the Courts in which Respondent is admitted to practice: lists areas of law not approved for advertising purposes: and further fails to include the required statement disclaiming certification of expertise in said areas, all contrary to DR2-101(E), Rule 4, Supreme Court of Missouri.

Count II

That Respondent did cause an advertisement to be placed in the yellow pages of the Southwestern Bell Telephone Company telephone directory for the St. Louis Suburban West issued in February 1978, said advertisement being for Respondent's law office, which did not comply with the provisions of the Order of the Supreme Court of Missouri dated October 24, 1977 concerning lawyer advertising and the Addendum thereto adopted by the Advisory Committee on November 18, 1977, in that, said advertisement lists the Courts in which Respondent is admitted to practice; lists areas of law not approved for advertising purposes; and further fails to include the required statement disclaiming certification of expertise in said areas, all contrary to DR2-101(B), Rule 4, Supreme Court of Missouri.

Count III

That Respondent did allow professional announcement cards, announcing the opening of Respondent's office, to be sent to persons other than lawyers, clients, former clients, personal friends, and relatives, contrary to DR2-102(A)(2), Rule 4, Supreme Court of Missouri.

Count IV

That Respondent did cause an advertisement to be placed in the yellow pages of the Southwestern Bell Telephone Company telephone directory for August of 1978, said advertisement being for Respondent's law office, which did not comply with the provisions of the Order of the Supreme Court of Missouri dated October 24, 1977 concerning lawyer advertising and the Addendum thereto adopted by the Advisory Committee on November 18, 1977, in that said advertisement lists the Courts in which Respondent is admitted to practice and lists areas of law which are not approved for advertising purposes, contrary to DR2-101(B), Rule 4, Supreme Court of Missouri.

WHEREFORE, the Advisory Committee respectfully requests the Court to hear the evidence relating to said charges and after due hearing, to find that said charges are true and in violation of the Disciplinary Rules herein stated, and that the Court enter its judgment finding Respondent guilty of said charges, and ordering that the said Richard M. Jacobs be disbarred, that his right and license to practice law in this state be cancelled and terminated, and that his name be stricken from the roll of attorneys in this state, or such other discipline as the Court deems appropriate in the premises.

The ADVISORY COMMITTEE of the
MISSOURI BAR ADMINISTRATION

/s/ Harold W. Barrick
General Chairman

APPENDIX F

Return To Information

The Respondent, for his return to the Information filed herein, waives service of process and enters his general appearance in the case. Respondent expresses his willingness to submit the case directly to the court on the pleadings and on the record made before the Advisory Committee.

The Respondent states that at all times material to this proceeding, he has been a lawyer duly licensed and qualified to practice in the State of Illinois as well in the State of Missouri.

Count I

a. Respondent admits that an advertisement for his law office appeared in the January-February 1978 issue of West End Word;

b. That said advertisement was arranged for before the issuance of the Supreme Court Order and Advisory Committee Memorandum as set out in the Information, and was published after December 31, 1977 through no fault of Respondent but by reason of an error on the part of the publisher;

c. The said advertisement at the time it was arranged did not violate any valid statute or rule, and that the respondent had the right to publish it under the Constitution of the United States, Amendments I and XIV, and that any statute or rule then in effect which limited his right so to publish was unconstitutional and in violation of the said constitutional provisions;

d. That respondent had no actual notice of any change in the rules of this court, or of the Advisory Committee memorandum until receipt of the General Chairman's letter of December 19, 1977.

e. Respondent does not challenge the disclaimer as specified in Supreme Court Rule 4, DR 2(101)(B), and has made such use

of the disclaimer, and proposes to make use of this disclaimer in any future advertising, but states that the only reason it was not included in the West End Word advertisement was that the advertisement was arranged before the disclaimer rule was published;

f. Respondent under the First and Fourteenth Amendments to the Constitution of the United States has the constitutional right to publish an advertisement setting forth the fields of law practiced in meaningful and understandable language to the layman, without restriction as required by the wording of the Advisory Committee Memorandum, and also has the constitutional right to list in an advertisement the courts before which he is licensed to practice; that the Supreme Court Order (DR 2-101[B]) and Advisory Committee memorandum are unconstitutional and violate the First and Fourteenth Amendments to the Constitution of the United States to the extent that they deprive respondent and others in his position of the right to do so.

* * *

i. For all of the reasons alleged in paragraphs "b" through "h" above, Count I of the Information fails to state valid grounds for disciplinary action.

Count II

Respondent admits that he caused an advertisement to be placed in the Suburban West Telephone Directory as set out in Count II of the Information but states that the said advertisement was arranged before the publication of the Supreme Court Order and Disciplinary Rule as set out in the Notice, and adopts the provisions of paragraphs: c, d, e, f, g and h of Count I of this return and incorporates them herein by reference.

Count III

Respondent denies the allegations of Count III of the Information. Further responding, respondent states that he has the constitutional right to distribute an announcement containing the material set out in Count III of the Information to any persons he chooses, without restriction to lawyers, clients, former clients, personal friends and relatives, under the First and Fourteenth Amendments to the Constitution of the United States, and that DR 2-102(a)(2), Rule 4, Supreme Court of Missouri, is unconstitutional to the extent that it purports to limit this right.

* * *

Count IV

a. Respondent admits that he caused an advertisement to be placed in the Yellow Pages of the Southwestern Bell Telephone Directory for Greater St. Louis; published in August of 1978;

b. Adopts the provisions of paragraphs c, e, f, g and h of the return to Count I as part of this return to Count IV, and states that the provisions of the Supreme Court Order and Advisory Committee Memorandum are unconstitutional and the Advisory Committee Memorandum is in violation of Article V, Sections V of the Constitution of the State of Missouri for the reasons there assigned to the extent that they purport to prevent the publication of the contents of the said advertisement;

c. States that he is licensed to practice in the State of Illinois, that the said telephone directory circulates in the State of Illinois, that the advertisement is in accord with the laws of Illinois and governing Rules of the Supreme Court of Illinois, and that any attempt by the State of Missouri or its agencies to restrict its publication would constitute an unconstitutional

burden on interstate commerce, in violation of the provisions of Article I, Section 8, of the Constitutional of the United States.

WHEREFORE, Having fully made return, Respondent prays that all proceedings against him be terminated and that he recover his costs herein expended.

APPENDIX G

STIPULATION

(Exhibits Omitted)

The following matters are stipulated between the parties for purposes of this action, each party reserving the right to object to relevancy or materiality:

1. The respondent, Richard Jacobs, graduated from law school in 1973 in Illinois, and, in the same year, was admitted to the bars of both Missouri and Illinois. He practiced in Illinois for several months before being employed by the United States Securities and Exchange Commission and later received an appointment to the Presidential Clemency Board.

2. In August of 1976 the respondent moved to St. Louis from Washington, D.C. In April of 1977 he leased a law office in Clayton, Missouri and began the practice of law as a sole practitioner at that office.

3. Following the decision of the Supreme Court of the United States in *Bates and O'Steen* v. *Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (June 27, 1977), the grievant caused advertisements to be placed in several suburban newspapers in the St. Louis area. These advertisements are not the subject of any pending count of the Information.

4. On October 24, 1977, the Supreme Court of Missouri entered an order amending DR 2-101 of Rule 4, with the amendment to be effective January 1, 1978. Notice of the Order of October 24, 1977 was published in the Journal of the Missouri Bar for December, 1977.

* * *

6. In October of 1977 the respondent entered into a contract for the publication of an advertisement in the West End Word, a newspaper published in St. Louis, Missouri. The last adver-

tisement pursuant to the contract was to run in the December 1977 issue. The advertisement was published in November 1977 and, through an oversight of the publisher and through no fault of the respondent, was omitted in December 1977 but then published in January 1978. The advertisement, Exhibit 2, is the subject of Count I of the Information.

7. The respondent has not made use of newspaper advertising following the appearance of the West End Word advertisement.

8. On November 3, 1977 the respondent signed a contract for advertising in the Yellow Pages for the St. Louis Suburban West Telephone Directory, (Exhibit 3). The advertisement, which appeared in the February 1978 issue of the directory, is set out in Exhibit 4 and is the subject matter of Count II of the Information.

* * *

11. The Advisory Committee Addendum was adopted November 16, 1977 and became effective by its terms on January 1, 1978 (Exhibit 10). It was not published in the Journal of the Missouri Bar until the January-February 1978 issue.

12. The respondent testified that, following receipt of the General Chairman's letter of December 19, 1977, he called the publishers with whom he had placed advertisements for the purpose of modifying them to comply with the Advisory Committee's Addendum to DR 2-101-B which was to be effective on January 1, 1980, but in each case was told that it was too late to make any changes in the publications which were in the process of production.

13. Following the opening of his law office, the respondent sent out announcements about the new office in the form of Exhibit 11.

14. If Dr. Gordon M. Goldman were called as a witness he would testify as set out in Exhibit 12.

15. If Mrs. M. Goldman were called as a witness she would testify as set out in Exhibit 13.

16. The respondent testified at the formal hearing that his wife helped him in sending out announcements to friends and relatives, that she sent out announcements to persons she had known in a group known as "Life Seekers", which interests itself in the problems of newborn infants, that she used the Life-Seekers roster for the correct spellings and addresses but did not send out announcements to everyone on the roster, that he considered that such persons his wife knew were "friends" within the meaning of DR 2-102, and that he had no intention, nor did he, send announcements to persons with whom he had no connection. Further, he had no intention of sending more than one announcement to any person and, if any person received more than one, this was a mistake. He takes the position at this hearing that he cannot be disciplined on account of his having sent out such announcements. He, nevertheless, is of the opinion that an attorney is entitled, if he wishes to bear the expensive cost of first class mailing in lieu of a newspaper advertisement, under controlling decisions of the Supreme Court of the United States, to mail such announcements of the opening of a law office to persons he does not know.

17. Respondent caused an advertisement, Exhibit 14, to be inserted in the August 1978 Yellow Pages for St. Louis. This advertisement is the subject of Count IV of the information.

* * *

19. The "Yellow Pages" mentioned in paragraph 17 and 18 are circulated in both Missouri and Illinois; to wit: the City of St. Louis, St. Louis County, East St. Louis, Illinois and Granite City, Illinois.

20. The Yellow Page advertisements which are the subject of Counts I, II, and IV of the Information are proper and have been proper under the rules of the Supreme Court of Illinois. Illinois Bar opinion is set out in Exhibit 17.

21. The areas of law practiced by the respondent, as listed in the Yellow Page advertisements, are among the areas of law listed by the American Bar Association in its compilation of "fields of law."

22. The respondent practices law in both Illinois and Missouri and he has clients, and accepts clients, from both states.

APPENDIX H

Report Of Committee
(September 9, 1977)

Honorable J. P. Morgan
Chief Justice
Supreme Court of Missouri
Supreme Court Building
Jefferson City, Missouri

Dear Mr. Chief Justice:

We take this means of submitting to the Court another interim report from your Committee on Professional Ethics and Responsibility which was created by order of the Court on June 25, 1974. This committee succeeded an earlier committee which examined the then proposed American Bar Association Code of Professional Responsibility in 1970, and a number of the members of the present committee, including the chairman, served on the earlier committee. That review produced a lengthy printed report to the Court, following which the Code was adopted with certain significant deletions and amendments recommended by the committee. This committee also has reported previously on other matters.

Our immediate problem involves advertising by lawyers which has been a matter of some attention and concern in the profession and elsewhere for a number of years. The immediacy of the matter arises out of the decision of the Supreme Court of the United States in *Bates and O'Steen* v. *State Bar of Arizona* on June 27, 1977.

We have considered carefully the principal opinion and, because it was a court divided five to four, the dissenting opinions as well. We have further considered carefully the report of the Task Force on Lawyer Advertising created by Justin A. Stanley, President of the American Bar Association, immediately

following the *Bates and O'Steen* decision. We have further studied carefully the report of the Board of Governors of the American Bar Association to the House of Delegates, as well as the recommendations adopted by the House of Delegates on August 10, 1977, following the Task Force and Board of Governors reports. We have also had available a wealth of material from other sources.

Those American Bar Association studies brought forth two proposals which have come to be known as Proposals A and B, respectively. The House of Delegates approved Proposal A as amendments to the Code of Professional Responsibility. The House further directed that both Proposals A and B be circulated to the various states and regulatory agencies for their consideration. The committee has heretofore provided the Court with copies of both the Task Force and Board of Governors reports, together with Proposals A and B.

We have met on several occasions and have spent many hours beyond the meetings themselves in consideration of the matters involved.

Early on, the committee unanimously favored the approach of Proposal A for amendments to the Ethical Considerations and Disciplinary Rules under Canon 2. We have made substantial amendments to Proposal A, however, for adaption to the present Ethical Considerations and Disciplinary Rules under Canon 2 in Missouri.

I am attaching as a part of this report the committee's recommendations respecting amendments to the Ethical Considerations and Disciplinary Rules under Canon 2. Deletions in the present rule are identified by brackets. Changes or additions in the text are indicated by underlining. The committee is unanimous in these recommendations.

Without attempting to review or examine all of the somewhat complicated and difficult issues at length, it is necessary to comment in several areas.

The injunction of Canon 2 to lawyers is to "assist the legal profession in fulfilling its duty to make legal counsel available." The narrow majority in *Bates and O'Steen* holds that advertising by attorneys is not subject to blanket suppression under the First Amendment to the Constitution of the United States. It further holds, however, that advertising by attorneys may be regulated and that there may be reasonable restrictions on the time, place and manner of advertising. False, deceptive or misleading advertising is expressly proscribed, as are advertising claims as to the quality of services. Special problems with electronic media were said to warrant special consideration. Finally, the constitutional issue was confined by the Court in the concluding paragraph of the majority opinion to a publication in a newspaper of a truthful advertisement concerning the availability and terms of "routine legal services."

To the end that members of the profession in Missouri may fulfill their duty under Canon 2 and that the law as declared by five justices in *Bates and O'Steen* may be implemented in Missouri, we have sought to draw a middle ground between a prohibition, on one hand, and unlimited advertising on the other, as did the Court. Under the circumstances, and with the facts in *Bates and O'Steen* in mind, we believe we have done so.

We have recommended approval of limited advertising in newspapers, periodicals and the yellow pages of telephone directories distributed in the geographic areas in which the lawyer resides or maintains offices, or in which a substantial part of the lawyer's clientele resides. We have not recommended approval of electronic media advertising, billboards, or handbills.

We have recommended approval of nine categories of information which may be included in such advertisements, including fixed fees for ten specific routine legal services and a provision for advertising fixed fees for such other routine legal services as may be approved by the Missouri Bar Administration, all to be restricted against misunderstanding or deception by re-

quirements that the advertisement disclose that the quoted fee is available only to those whose matters fall into the services described, and that the client is entitled without obligation to a specific estimate of the fee likely to be charged, both to be in similar print size.

We have approved an indication of the area or areas of practice. Designations of particular areas or fields of law in which a lawyer practices must be authorized for that purpose by the Missouri Bar Administration. We have not approved statements indicating a limitation of practice or specialization beyond the traditional three areas of specialization. A proposal for certification of specialists is now before the Court. Until such time as action is taken in that area specifically, the committee felt that specialization should be excluded from these amendments.

The present limitations against in-person or one-on-one solicitation are continued. Where in-person advice is now approved in very limited circumstances, acceptance of employment or other benefit in connection with such in-person advice is generally forbidden, as heretofore.

In the opinion of the committee, the recommended amendments will satisfy the requirements of *Bates and O'Steen* and will strike a midpoint between prohibition and unlimited advertising, such as contemplated by the majority opinion in that decision. The proposed amendments will further fulfill the profession's duty to make legal counsel available to the public.

Members of the committee will be happy to meet with the Court at its convenience to discuss this report.

APPENDIX I

RESPONDENT'S MOTION FOR REHEARING

Pursuant to this court's Rule 84.17 the respondent, RMJ, respectfully moves the court to set aside the opinion of December 15, 1980 and to grant rehearing, or to modify or supplement the said opinion in the manner hereinafter suggested, for the following reasons:

1. The court overlooked the provisions of Article VI of the Constitution of the United States, as follows:

> "This Constitution...shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding."

2. In declining to consider the latest controlling decision of the Supreme Court of the United State, the court did not explicity state which counts of the information were found to be violated by the respondent. We assume that the court intended to find violations of all four counts, but suggest that there should be an explicit statement of this.

3. The court did not expressly decide the constitutional validity of DR 2-102 of Rule 4 of this court, which is alleged to be violated in the matters specified in Count III of the Information. We assume that the court intended to hold that DR 2-102 is constitutionally valid and that violation as charged in Count II has been established, but suggest that there should be an explicit statement.

4. The court overlooked and failed to rule on the matter raised in Point III(a) of respondent's brief, in which it is contended that the portion of Counts I and II which assert that absence of a required disclaimer do not state ground for discipline, inasmuch as respondent contracted for the advertising there

specified before the Advisory Committee Addendum was issued and long before he had any knowledge or means of knowledge, and respondent tried to withdraw the advertisements after learning of the Advisory Committee Addendum.

5. The court failed to rule on the contention set forth in Point I(b) of respondent's brief, in which it is argued that DR 2-101-B and the Advisory Committee Addendum should be construed, not as setting forth the only matter which may be contained in advertising, but as setting forth the matters which lawyers may advertise with assurance and without fear of challenge. We assume that the court decided the point adversely to our contention, and adopted the Informants' contrary contention that the rule and addendum set forth the only matters that may be properly advertised, but suggest that there should be an explicit statement of the court's holding.

6. The court, in properly characterizing this case as a "test" case, should make it clear that the case involved an actual controversy in which the Advisory Committee proceeded against the respondent against his will, filing an information seeking disbarment, and that the case has been sharply contested at all stages.